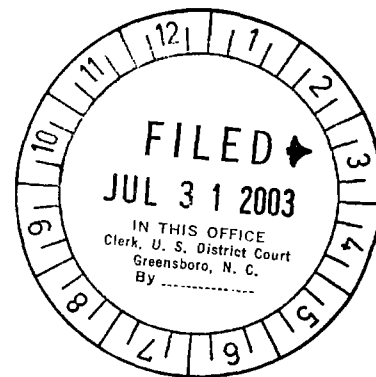


IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

R.J. REYNOLDS TOBACCO	)	
COMPANY	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:00CV00260
	)	
S K EVERHART INC. d/b/a TRINDALE	)	
FOODS, STEPHEN BANKS	)	
EVERHART, KATHY EVERHART,	)	
SOUTHLAND TRADE	)	
CORPORATION, RUSSELL	)	
HASTINGS, LOUISE HARRELL,	)	
GREAT STEAKS MARKET, JOHN	)	
MARK SECHREST, RICHARD	)	
TERRELL, KINGSWAY	)	
ENTERPRISES, INC., JAMES T.	)	
KING, SOUTHERN SALES &	)	
IMPORTS, and EDWIN SECHREST	)	
Defendants.	)	



MEMORANDUM OPINION

TILLEY, Chief Judge

This matter is now before the court on Southern Sales and Imports' Motion to Dismiss [Doc. # 35], Edwin Sechrest's Motion to Dismiss [Doc. # 35], Richard Terrell's Motion to Dismiss [Doc. # 39], R.J. Reynold's Motion for Judgment on the Pleadings or Partial Summary Judgment as to S K Everhart, Stephen Everhart, Great Steaks Market, and John Sechrest [Doc. # 59], S K Everhart's Motion to Dismiss R. J. Reynolds' Motion for Judgment on the Pleadings [Doc. # 70], and R. J. Reynold's Motion to Strike S K Everhart's Motion to Dismiss [Doc. # 73].

For the reasons stated below, the Motions to Dismiss [Docs. # 35, 39] are

DENIED, R.J. Reynold's Motion for Judgment on the Pleadings or Partial Summary Judgment as to S K Everhart, Stephen Everhart, Great Steaks Market, and John Sechrest [Doc. # 59] is DENIED, and R.J. Reynold's Motion to Strike [Doc. # 73] is MOOT. The docket should be amended to reflect that S K Everhart's Pleading Doc. # 70 is a responsive pleading rather than a Motion to Dismiss.

I.

The allegations of the complaint, stated in the light most favorable to the plaintiff, are as follows: R.J. Reynolds Tobacco Company ("RJR"), a cigarette manufacturer, works with cigarette retailers to develop promotional programs that will increase RJR's market share and also increase sales at retail outlets. One such promotional program is the "Buy Down" program. Under the Buy Down program, RJR "promotes certain brands of cigarettes by reducing, or 'buying down,' the retail price to consumers." Comp. ¶ 30. RJR accomplishes the price reduction generally by making direct payments to retailers to discount the retail price of cigarettes. In order to receive these direct payments, a retailer usually purchases cartons of cigarettes from a wholesaler. The retailer then presents the wholesale invoice to RJR. RJR issues a check to the retailer for the amount of the buy down discount. Retailers who participate in the buy down program are required to pass the discounted price on to consumers.

Although the specific allegations against each defendant will be addressed in more detail below, the general "scheme to defraud" as alleged by RJR is as

follows: wholesalers and retailers “engaged in sham sales and purchases” of RJR cigarettes. Essentially, RJR alleges that a wholesaler would sell cigarettes to a retailer and create an invoice. The retailer would present that invoice to RJR through the mail, and RJR would mail a check for the “buy down” discount to the retailer. At this point, the retailer would return the cigarettes to the wholesaler and send an invoice to the wholesaler for a refund. The retailer and the wholesaler then pocketed the buy down discount money. Sometimes, the wholesaler actually shipped cigarettes to the retailer, who then shipped them back to the wholesaler after receiving the discount check from RJR. At other times, however, no cigarettes were actually “shipped or returned at all, and the fraud was a wholly paper transaction.” Comp. ¶ 38.

In a variation of the fraud, a retailer would purchase cigarettes from one wholesaler who would invoice the purchase, and the retailer would pay the invoice. The retailer then presented the invoice to RJR, which paid the Buy Down discount. The retailer, rather than selling the discounted cigarettes to consumers, then sold the cigarettes to another wholesaler.

Another promotional program involved the use of coupons. In this program, a retailer purchased cartons of cigarettes from a wholesaler at normal wholesale price. An RJR sales representative visited the retailer’s store and attached coupons to the cigarette cartons for the purpose of providing consumers with a discounted price on the carton. The consumer “removed the coupon at the time of purchase,

presented it to the retailer, and received an instant discount.” Comp. ¶ 43. The retailer then mailed the coupons to RJR, which mailed the retailer a check for “the total value of the coupons redeemed plus 8 cents per coupon for handling and a reasonable reimbursement for shipping expenses.” Comp. ¶ 43.

RJR alleges that some of the defendants “diverted the coupons to themselves.” Comp. ¶ 44. According to the complaint, a retailer would purchase cigarettes from a wholesaler. After the RJR sales representative placed the coupons on the cartons, the retailer would remove the coupons. The retailer would then return the cartons to the wholesaler, who would sell those cartons to another retailer. The retailer mailed the coupons to RJR, and RJR mailed a check to the retailer.

RJR has filed this complaint seeking \$5 million dollars in compensatory relief, treble damages, and attorneys’ fees. The complaint alleges violations of the federal civil Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1961, et seq., violations of the state civil RICO statute, N.C. Gen. Stat. § 75D-3, et. seq., the North Carolina Unfair and Deceptive Trade Practices Act, and common law fraud.

## II.

Defendants Southern Sales & Imports and Edwin Sechrest (hereinafter collectively referred to as “SSI”) and Defendant Richard Terrell (“Terrell”) assert that the complaint should be dismissed because RJR has failed to satisfy the

requirements of Federal Rule of Civil Procedure 9(b), which provides that "[i]n all averments of fraud[,] the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b) (West Supp. 2003). RICO claims based on fraud must satisfy the Rule 9(b) particularity requirement. Menasco, Inc. v. Wasserman, 886 F.2d 681, 684 (4th Cir. 1989). The Fourth Circuit has explained that a court "should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which [he] will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999).

A.

Terrell asserts that RJR has not satisfied the particularity requirements of Rule 9(b) because the complaint does not contain a detailed description of the particular acts Terrell is accused of committing. In the complaint, RJR alleges that Terrell was an officer and president of Byrd Foods. ¶ 17. The complaint also contains allegations that Terrell "operated the scheme" that was generally described in the complaint. ¶ 78. The complaint contains detailed descriptions of five specific instances in which Byrd Food purchased cigarettes from a wholesaler, received buy down discounts on those cigarettes, and then returned those cigarettes to a wholesaler rather than selling them to consumers at a discounted price. (¶ 79-83). Following the description of these specific examples, RJR alleges

that Terrell was engaged in the acts described above. (¶ 84).

The allegations in the complaint provide Terrell with sufficient information to inform him of the charges against him and to allow him to prepare a defense for trial. In addition, the detailed descriptions of specific transactions demonstrate that RJR has prediscovery evidence of the allegations contained in the complaint. Terrell's motion to dismiss the claims against him pursuant to Rule 9(b) is DENIED.

B.

SSI also asserts that allegations in the complaint are insufficient to satisfy the particularity requirement of Rule 9(b). As to SSI, the complaint alleges that Edwin Sechrest contacted a wholesaler and informed the wholesaler that SSI had "bought-down cigarettes available." ¶ 92. The complaint further alleges that SSI then sold bought-down cigarettes, "at a price below the normal wholesale price," to a wholesaler. That wholesaler, in turn, sold the bought-down cigarettes to a retailer at the normal wholesale price. ¶ 92. The complaint then describes three specific instances, including dates, number of cartons, and dollar amounts in which SSI sold cigarettes to a wholesaler at below wholesale price. ¶ 93-95. It can be inferred from the language of the complaint that the cigarettes SSI sold below wholesale price were "bought down" cigarettes.

These allegations are sufficient to provide SSI with notice of the charges against them so that they can prepare a defense. In addition, the transactions are described with a specificity that demonstrates RJR has prediscovery evidence of

the alleged fraudulent conduct. SSI's motion to dismiss on the basis of Rule 9(b) is DENIED.

### III.

SSI and Terrell have filed motions to dismiss the RICO claims<sup>1</sup> pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Fourth Circuit has explained that a rule 12(b)(6) motion should be granted only if, after accepting all well-pleaded allegations in the complaint as true, it appears certain that RJR cannot prove any set of facts in support of its claims that entitles it to relief. Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). Thus, "[u]nder the liberal rules of federal pleading, a complaint should survive a motion to dismiss if it sets out facts sufficient for the court to infer that all the required elements of the cause of action are present." Wolman v. Tose, 467 F.2d 29, 33 n. 5 (4th Cir.1972). It is necessary, therefore, to consider the causes of action alleged by RJR.

#### A.

RICO provides a civil remedy to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964. (West Supp. 2003). A successful RICO plaintiff may recover treble damages, costs incurred in pursuing the suit, and attorney's fees. 18 U.S.C. § 1964. Id.

---

<sup>1</sup> Because the North Carolina RICO statute mirrors the federal RICO statute, they will be considered simultaneously.

1.

In this case, RJR has alleged that the defendants are subject to RICO civil liability because they violated 18 U.S.C. §§ 1962(a), (c), and (d). Each of these sections require proof of the following common elements: (1) an enterprise and (2) a pattern (3) of racketeering activity. Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985).

a.

First, RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (West Supp. 2003). The alleged "enterprise" must be an entity whose members are "associated together for a common purpose of engaging in a course of conduct," and must be separate and distinct from the RICO defendants. United States v. Turkette, 452 U.S. 576, 583 (1981).

The complaint alleges two alternative enterprises. Count I describes the first alleged enterprise as consisting of "R.J. Reynolds along with various wholesalers, including Central, and various retailers, including the defendants, [that] formed an 'association-in-fact' through their marketing relationships." Comp. ¶ 105. The complaint describes that this association-in-fact had a "unity of purpose: to promote R.J. Reynolds cigarettes to consumers in order to increase R.J. Reynolds' market share among adult smokers, while simultaneously increasing adult smoker

traffic in retailers' stores." Comp. ¶ 105. Count II alleges that Central Wholesalers, Inc. was an enterprise and that "[a]t all relevant times, all defendants were persons 'associated with' the Central Enterprise" because "each defendant worked with Central to operate a scheme to defraud R.J. Reynolds by submitting fraudulent Buy Down requests." Comp. ¶ 113. In their moving papers, the defendants do not dispute that RJR has sufficiently alleged the existence of an enterprise. Rather, SSI and Terrell both assert that there are not sufficient facts to support an inference that they engaged in a "pattern of racketeering activity."

b.

The "pattern" element requires that at least two acts of racketeering activity within a ten year period be pleaded. 18 U.S.C. § 1961(5). (West Supp. 2003). Although the statute requires only two predicate acts within a ten year period, the Supreme Court has held that allegation of two of these "predicate" acts, while necessary, is not sufficient to satisfy the "pattern of racketeering" requirement. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989). To determine whether the alleged conduct constitutes a pattern of racketeering activity, the Court developed a two-part test: (1) whether the predicate acts are related, and (2) whether they pose a threat of continued criminal activity. Id.

Acts are related if they "have the same or similar purposes, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events." Id. at 240. The "continuity" element

refers to either "a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 241. There are two types of continuity: closed-ended and open-ended. H.J., Inc., 492 U.S. at 241. The distinction between closed-ended continuity and open-ended continuity turns on whether the defendants' conduct is an isolated scheme with a finite goal or whether there is a possibility that the defendant's conduct is something that could continue indefinitely. See Brandenburg v. Seidel, 859 F.2d 1179, 1186 (4th Cir. 1988) (explaining the distinction between a scheme that involves "the commission of multiple preparatory acts aimed at the infliction of a single basic injury" and criminal activity that "threaten[s] to continue unabated, driven by the possibility of repeated economic gain, until the defendants were caught").

In this case, RJR has alleged a scheme in which numerous wholesalers and retailers purchased, returned, and resold bought-down RJR cigarettes on numerous occasions over at least a four year period in order to obtain RJR buy down discounts fraudulently. The conduct at issue was not directed toward the infliction of a single injury, rather, the scheme could have continued indefinitely and ended only because North Carolina law enforcement officers began to investigate the defendants' conduct.

As to Terrell, the complaint lists five specific instances in which he was engaged in this scheme by buying cigarettes, obtaining a buy down discount, and then returning the cigarettes to a wholesaler rather than selling them to consumers;

the complaint also states that there are many other such instances. As to SSI, the complaint asserts that SSI contacted a wholesaler about selling bought-down cigarettes and details three specific instances in which SSI sold RJR cigarettes below wholesale price.

At a later stage in the proceedings, it may be determined that the defendants' conduct does not constitute a pattern for purposes of RICO; however, at the 12(b)(6) stage, the allegations are sufficient to state a RICO claim.

c.

Finally, RICO enumerates a list of state and federal crimes that constitute "racketeering activity" and thus serve as "predicate acts" under the RICO statute. See 18 U.S.C. § 1961(1). Mail fraud and wire fraud are listed in § 1961 as predicate acts. RJR claims that the racketeering activity at issue is mail and wire fraud.

SSI and Terrell contend that they are not subject to RICO liability because RJR has not pled facts sufficient to support an inference that they committed the predicate act of mail fraud or wire fraud. The elements of mail fraud<sup>2</sup> are "(1) a scheme disclosing an intent to defraud, and (2) the use of the mails [or the wires] in furtherance of the scheme." Chisolm v. TranSouth Financial Corp., 95 F.3d 331, 336 (4th Cir.1996). The "use of the mails [or wires] need not be an essential

---

<sup>2</sup> The elements for wire fraud and mail fraud are the same. Johnson v. Collins Entertainment Co., Inc., 199 F.3d 710, 722 (4th Cir. 1999).

element of the scheme. It is sufficient for the mailing [or use of the wires] to be 'incident to an essential part of the scheme.'" United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 253 (4th Cir.2001). As the Fourth Circuit has explained, the key is whether the communication occurred "for the purpose of executing the scheme." Morley v. Cohen, 888 F.2d 1006, 1009-10 (4th Cir.1989).

In the complaint, RJR has described a fraudulent scheme in which wholesalers and retailers worked together to obtain buy down discounts under false pretenses. The complaint alleges that Terrell operated the scheme by purchasing cartons of cigarettes, presented invoices of these carton purchases to RJR, obtaining buy down discount checks from RJR through the mail, and then selling those cigarettes to retailers or wholesalers rather than to consumers. RJR has alleged that retailers and wholesalers knew the buy down discounts should be passed to consumers. RJR alleges that Terrell's presentation of an invoice to RJR to obtain a buy down discount for cartons and keeping that discount rather than passing it on to consumers constitutes misrepresentation. The mails were used to receive the buy down discounts from RJR. RJR has alleged facts sufficient to support an inference that Terrell committed mail fraud.<sup>3</sup>

The allegations against SSI, however, do not involve receipt of payment directly from RJR through the mail. Rather, the allegations against SSI consist of

---

<sup>3</sup> For these reasons, Terrell's motion to dismiss the common law fraud claim on the basis that he did not make a misrepresentation to RJR is DENIED.

the allegation that Edwin Sechrest contacted a wholesaler and informed the wholesaler that SSI had bought-down cigarettes to sell. The detailed transactions in the complaint describe situations in which SSI sold cigarettes to a wholesaler at a price below wholesale. SSI contends that the sale of cigarettes below wholesale price is not sufficient to state a claim for mail fraud or wire fraud.

However, the complaint alleges more than just the sale of cigarettes below wholesale price. When coupled with the allegation that SSI sought a purchaser for bought down cigarettes, it can be inferred that the cigarettes SSI sold at below wholesale price were indeed bought down cigarettes. RJR alleges that SSI was aware that buy down discounts were intended to benefit consumers and not retailers or wholesalers. RJR alleges that SSI used telephone lines to obtain a purchaser for bought down cigarettes. At this stage in the proceedings, RJR's allegations are sufficient to support an inference that SSI committed wire fraud.

2.

For purposes of 12(b)(6), RJR has alleged facts sufficient to support an inference that the elements common to any RICO violation have been satisfied, specifically that the defendants engaged in a pattern or racketeering. Now it is necessary to determine whether RJR has stated a claim for violations of any of the particular RICO provisions: § 1962(a), § 1962(c), or § 1962(d).

a.

Section 1962(a) provides that "[i]t shall be unlawful for any person who has

received any income derived . . . from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise." 18 U.S.C. § 1962(a). (West Supp. 2003). To plead a violation of § 1962(a), a plaintiff must allege "(a) receipt of income from a pattern of racketeering activity, and (b) the use or investment of this income in an enterprise." Busby v. Crown Supply, Inc., 896 F.2d 833, 836 (4th Cir.1990).

The complaint specifically alleges that Terrell and SSI "received income from the pattern of racketeering" and that they "used or invested the fraudulently-obtained income" they received "to expand its operations, and to facilitate its continued scheme." Comp. ¶ 139. These allegations are sufficient to withstand dismissal of the § 1962(a) claims pursuant to Rule 12(b)(6). The defendants' Motions to Dismiss the § 1962(a) claims are DENIED.

b.

Section 1962(c) only imposes liability on those who "conduct or participate, directly or indirectly in the conduct of an enterprise's affairs." 18 U.S.C. § 1962(c). To determine whether a defendant has conducted or participated in the conduct of an enterprise, the Supreme Court has adopted the "operation or management" test which requires that a defendant have some part in directing the affairs of the enterprise in order to be held liable under RICO. Reves v. Ernst & Young, 507 U.S. 170, 179 (1993).

Terrell has asserted that he cannot be subject to RICO liability because he did not “conduct or participate” in the conduct of the enterprise’s affairs. The complaint alleges that Terrell “operated the scheme.” Such an allegation is sufficient to satisfy the “operation or management” test. The defendants’ Motions to Dismiss the § 1962(c) claims are DENIED.

c.

Section 1962(d) prohibits a conspiracy to violate any of the provisions of subsections (a), (b) or (c). 18 U.S.C. § 1962(d). Under United States v. Pryba, 900 F.2d 748 (4th Cir.1990), a RICO conspiracy may be proven by showing “that each defendant agreed that another coconspirator would commit two or more acts of racketeering . . . RICO conspiracy does not require that each coconspirator personally agree to commit two or more acts of racketeering.” Id. at 760. The Fourth Circuit has instructed that a plaintiff’s allegations are sufficient if they support the conclusion that the defendants “agreed that another coconspirator would commit two or more acts of racketeering.” Id.

The complaint alleges that the defendants “entered into an agreement to conspire to violate 18 U.S.C. § 1962(a) and (c)” by committing acts of mail fraud and wire fraud in order to obtain buy down discounts. ¶¶ 155-57. These allegations are sufficient to withstand dismissal of the § 1962(d) claim. The defendants’ Motions to Dismiss the § 1962(d) claims are DENIED.

### III.

SSI asserts that RJR's common law fraud and Unfair and Deceptive Trade Practice claims are barred by the applicable statute of limitations. The statute of limitations for fraud or mistake is three years from the date when the plaintiff discovered the fraud or when the fraud should have been discovered. Grubb Properties, Inc. v. Simms Investment Co., 101 N.C. App. 498, 400 S.E.2d 85 (1991). There is a four-year statute of limitations for claims under North Carolina's Unfair and Deceptive Trade Practices Act. N.C. Gen. Stat. § 75-16.2. For actions based on fraud, as in this case, the cause of action accrues at the time the fraud is discovered or should have been discovered with reasonable diligence. Nash v. Motorola Communications and Electronics, Inc., 96 N.C. App. 329, 385 S.E.2d 537 (1989), aff'd., 328 N.C. 267, 400 S.E.2d 36 (1991). RJR's complaint states that the alleged fraud was discovered in March 1998. The complaint was filed on March 15, 2000. Taking the facts alleged in the complaint as true, the common law fraud and unfair and deceptive trade practice actions were commenced within the applicable statute of limitations. SSI's motion to dismiss the common law fraud and unfair and deceptive trade practice claims is DENIED.

### IV.

RJR has filed a motion for judgment on the pleadings on the state RICO claims as to S K Everhart, Stephen Everhart, Great Steaks Market, and John Sechrest [Doc. # 59]. In response to this motion, the defendants filed a document

entitled "Motion" asking that R. J. Reynolds' Motion for Judgment on the Pleadings" be dismissed. [Doc. # 70]. Because this document is in response to a motion, it is more properly characterized as a responsive pleading than a motion. The Court will consider the content of the document as responsive to RJR's motion for judgment on the pleadings. The docket sheet should be updated to reflect that Document Number 70 is not a motion requiring court action but a response to RJR's motion. Furthermore, R. J. Reynold's Motion to Strike S K Everhart's Motion to Dismiss [Doc. # 73] is MOOT.

In considering a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), facts presented in the pleadings and the inferences drawn therefrom must be viewed in the light most favorable to the non-moving party. Edwards v. City of Goldsboro, 178 F.3d 23, 248 (4th Cir.1999). A motion for judgment on the pleadings is determined by the same standard applied to a motion to dismiss for failure to state a claim. Id. at 243. A motion for judgment on the pleadings should be converted to a motion for summary judgment if matters outside of the pleadings are considered. Fed. R. Civ. P. 12(c).

The North Carolina RICO statute provides that "[a]ny innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages and reasonable attorneys fees." N.C. Gen. Stat. § 75D-8(c) (2000). RJR seeks judgment on two specific provisions of the state RICO

act, N.C. Gen. Stat. § 75D-4(a)(2) and N.C. Gen. Stat. § 75D-4(a)(3). A person has violated subsection(a)(2) if he conducts or participates in, directly or indirectly, any enterprise through a patter of racketeering activity. Subsection (a)(3) prohibits any person from conspiring with another to violate subsection (a)(2).

The defendants that are the subjects of RJR's motion have all pled guilty to state criminal charges for their involvement in what RJR has alleged is a "scheme to defraud." RJR asserts that these criminal guilty pleas and the factual basis supporting the pleas constitute per se violations of the state RICO statute. Because there is not a dispute regarding the factual basis supporting the guilty pleas, RJR will be entitled to judgment if the pleadings demonstrate as a matter of law that the defendants (1) conducted, participated, or conspired to conduct or participate in; (2) any enterprise; (3) through a pattern of racketeering, then RJR will be entitled to the entry of judgment on the state RICO claims.

In state court, Trindale, through Stephen Everhart, pled guilty to one count of obtaining property by false pretenses, a felony offense under N.C. Gen. Stat. § 14-100. Stephen Everhart individually pled guilty to one count of solicitation to commit the misdemeanor offense of obtaining property by false pretenses punishable under N.C. Gen. Stat. § 14-2.6. According to RJR's brief in support of its motion, the factual basis supporting these pleas contained admissions that Trindale, through Everhart, entered into agreements with Central Wholesalers between May 7, 1997 and March 4, 1998 "to obtain multiple false and inflated

invoices from Central Wholesalers in a scheme to steal money from R.J. Reynolds.” Def. Brief at 4. Everhart also admitted that false and inflated invoices were submitted to an RJR sales representative for the purpose of obtaining buy down discounts for RJR.

John Sechrest pled guilty to felony obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100 and solicitation to commit the misdemeanor offense of obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-2.6. Great Steaks, through Sechrest, pled guilty to obtaining property by false pretenses. According to RJR’s brief in support of its motion for judgment, Schrest, individually and on behalf of Great Steaks, admitted that between May 15, 1997 and March 5, 1998, they (1) entered “an agreement with Central Wholesalers to obtain multiple false and inflated invoices from Central Wholesalers to steal money” from RJR and (2) submitted these false invoices to an RJR sales representative to obtain buy down discounts between May 15, 1997 and March 5, 1998. Def. Brief at 6.

The defendants do not contest that the guilty pleas and the factual basis supporting those pleas constitute a state RICO violation. Rather, the defendants argue that their guilty pleas were “Alford Pleas” in which they did not actually admit that they were guilty of the charged crimes. However, the North Carolina Court of Appeals has explained that an Alford plea constitutes “a guilty plea in the same way that a plea of nolo contendere or no contest is a guilty plea.” North

Carolina v. Alston, 139 N.C. App. 787, 792; 534 S.E.2d 666, (N.C. App. 2000) (quoting State ex rel. Warren v. Schwarz, 219 Wis. 2d 615, 579 N.W.2d 698, 706 (Wis. 1998)). As the North Carolina Court of Appeals further noted, “defendant’s protestations of innocence under his ‘Alford plea’ did not extend to future proceedings” Id. at 794. Furthermore, the state RICO statute provides that a “final conviction in any proceeding for a violation of those laws set forth in G.S. 75D-3(c) [listing predicate acts], shall estop the defendant in any subsequent civil action or proceeding under this Chapter as to all matters proved in the criminal proceeding.” N.C. Gen. Stat. § 75D-8(e) (2001). The defendants’ “Alford plea” argument is without merit.

The defendants also assert that RJR is not entitled to judgment on the state RICO claims because RJR has been paid restitution as a result of the criminal proceedings. However, the RICO statute provides that “Civil remedies under this Chapter are cumulative, supplemental and not exclusive, and are in addition to the fines, penalties and forfeitures set forth in a final judgment of conviction of a violation of the criminal laws of this State as punishment for violation of the penal laws of this State.” N.C. Gen. Stat. § 75D-10 (2001). The defendants’ restitution argument is without merit.

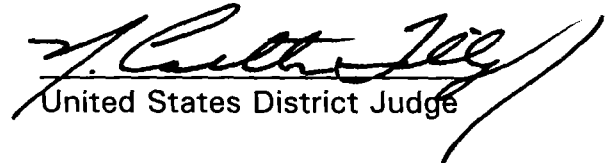
According to the pleadings, the defendants each pled guilty to one criminal count. While the factual basis supporting the guilty pleas describes that the defendants entered into an agreement to “obtain multiple fraudulent invoices” over

approximately a 10 month period, the pleadings are not specific as to the number of invoices. At this point, the facts in the pleadings are not sufficient to state as a matter of law that the conduct of the defendants constituted a "pattern" for purposes of the state RICO statute.

V.

In summary, the Motions to Dismiss [Docs. # 35, 39] are DENIED, R.J. Reynold's Motion for Judgment on the Pleadings or Partial Summary Judgment as to S K Everhart, Stephen Everhart, Great Steaks Market, and John Sechrest [Doc. # 59] is DENIED, and R.J. Reynold's Motion to Strike [Doc. # 73] is MOOT. The docket should be amended to reflect that S K Everhart's Pleading [Doc. # 70] is a responsive pleading rather than a Motion to Dismiss.

This the 31 day of July, 2003.

  
United States District Judge